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No. 04-9728

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IN THE

Supreme Court of the United States

DONALD CURTIS SAMSON,
Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the California Court of Appeal, First Appellate District

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BRIEF OF *AMICUS CURIAE* CITIZENS UNITED FOR REHABILITATION OF ERRANTS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Fourth Amendment prohibits police from conducting a warrantless search of a person who is subject to a parole search condition, where there is no suspicion of criminal wrongdoing, and the sole reason for the search is that the person is on parole?

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INTEREST OF AMICUS

Amicus Curiae Citizens United for Rehabilitation of Errants ("CURE") is a non-profit membership organization of families of prisoners, former prisoners and other concerned citizens.[1] CURE's mission is to assist former offend-

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[1] This *amicus* brief is filed with the consent of the parties, and letters of consent are being filed with the Clerk of the Court in accordance with this Court's Rule 37.3(a). Pursuant to Rule 37.6, the *amicus* submitting this brief and its counsel hereby represent that neither party to this case nor their counsel authored this brief in whole or in

ers in their reentry into society, to provide them all the rehabilitative opportunities they need to turn their lives around, and to enhance public awareness of the rights and needs of former prisoners as they embark on the path toward law-abiding lives and careers. Through a national network of state chapters, CURE is involved in promoting enlightened state and federal legislation on a multitude of issues concerning reform in prison, probation, and parole.

This case concerns whether a State may, consistent with the Fourth Amendment, subject parolees to suspicionless searches at any time. Subjecting parolees to such searches thwarts rehabilitation by undermining the parolee's ability to adopt the prospective attitude of a law-abiding citizen. Rehabilitation requires the parolee to conceive of himself as a responsible citizen. But suspicionless searches link the parolee to his criminal past, randomly subjecting him to an indignity and intrusion that is both characteristic of prison life and wholly at odds with being a responsible citizen. Amicus CURE has an interest in ensuring that the parolees are not subjected to such random searches and other indignities that undermine CURE's mission of rehabilitation.

SUMMARY OF ARGUMENT

The unquestionable goal of parole, to serve as a transition for the former offender to a law-abiding life, is thwarted by an unregulated police power to subject the former offender to random searches. The process of achieving desistance from criminal behavior requires that the parolee adopt a prospective attitude of law-abidingness, reflected in a self-chosen identity as a responsible citizen. Continued exposure to random searches of the sort associated with prison life denies the parolee a reasonable opportunity to achieve this new identity as an autonomous, civic-motivated

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part, and that no person other than *amicus* paid for or made a monetary contribution toward the preparation and submission of this brief.

citizen. In addition, police searches without any individualized justification or suspicion undermine the individual's trust in the fair processes of law, a trust that may be more efficacious than the deterrent mechanisms of the criminal law in inducing the parolee to commit to voluntary compliance with legal authorities.

ARGUMENT

I. Modern Criminology Has Identified The Crucial Process Of Desistance From Criminal Behavior As The Key To An Offender's Successful Reentry Into Society, And This Process Of Desistance Is Undermined By The Random Police Searches Of Parolees That The California Courts Have Adopted.

A major, indeed probably *the* major, new theme of contemporary criminology is the notion of desistance. Empirical research concerning the rehabilitation of former offenders has established the principle that offenders do not simply or suddenly end their proclivity toward criminal behavior. Indeed, conventional social science explanations for offender behavior have proved inadequate to explain why so many offenders cease to commit crimes even while outside of prison and while still physically able to commit crimes. Under this newer paradigm, many offenders undergo a process called desistance, which involves the creation of a new or renewed "pro-social" identity. Stephen Farrall & Shadd Maruna, *Desistance-Focused Criminal Justice Policy Research: Introduction to A Special Issue on Desistance from Crime and Public Policy*, 42 How. J. of Crim. Just. 358, 358-359 (2004).

Desistance theory has led criminologists to conclude that the most constructive reentry strategy for parolees is to enhance their ability to look forward to a new commitment to values of social citizenship, rather than remain locked in their former criminogenic identity. Stephen Farrall, *Rethinking What Works With Offenders: Probation, Social*

Context And Desistance From Crime (2002). Desistance requires the offender psychologically to separate from his former persona. Thus, to enhance the reintegration of former offenders, society must offer ways of reducing the stigma of diminished legal status that reinforces the former crime-focused self. Shadd Maruna, *Making Good: How Ex-Convicts Reform And Rebuild Their Lives* 165 (2001). The goal of desistance is the creation of a new autonomous citizen who *internalizes* the social good by accepting the challenges of a full civic identity. Sheldon Stryker, *The Past, Present, and Future of an Identity Theory*, 63 Soc. Psychol. Q. 284, 288-289 (2000).

Desistance research has shown that success in reentry requires the offender to change from a passive, rationalizing voice in which he describes his past as one of entrapment in deviance to an active voice by which he articulates his autonomy in choosing a self-determined constructive life. Maruna, *supra*, at 7-8. Desistance is enhanced by such concrete components of normal civic life as marriage, employment, or military service. John Laub & Robert Sampson, *Understanding Desistance From Crime*, 28 Crime and Justice: A Review of Research 1 (M. Tonry ed. 2000). But recent research confirms that establishment of a new civic-minded identity, with social reinforcement of that identity, is as crucial as any material restoration of rights.

A vital step in that process of reinforcement is the recapture of the common right of privacy and anonymity enjoyed by all citizens who avoid giving off any present basis for reasonable suspicion that they are engaged in criminal activity. Christopher Uggen, Jeff Manza & Angele Behrens, *Less Than the Average Citizen—Stigma, Role Transition, and The Civic Reintegration of Convicted Felons*, in After Crime and Punishment: Pathways to Offender Reintegration 261, 262 (Shadd Maruna & Russ Immarigeon eds. 2004). To be successful in reentry, the

offender must reemerge into virtuous participation in the civic world. *Id.* at 263. A major threat to that reemergence is the loss of privacy and anonymity that not only deprives the parolee of the publicly visible rights of citizenship, but also reinforces the stigmatized identity associated with the previous offending self. *Id.* at 276-277. That continued stigma after reentry has been condemned as "invisible punishment." Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in Invisible Punishment: The Collateral Consequences of Mass Imprisonment 15-36 (Marc Mauer and Meda Chesney-Lind eds. 2002).

This research has vindicated, through social science, what this Court had earlier affirmed as a principle of law:

> The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life.

Morrissey v. *Brewer*, 408 U.S. 471, 482 (1972). For these reasons, the Court concluded that the parolee must enjoy "many of the core values of unqualified liberty." *Ibid.*

The psychological processes of desistance require that the offender decide that his criminal behavior is separate from his true self. Stephen Farrall, *Social Capital and Offender Reintegration: Making Probation Desistance-Focused*, in After Crime and Punishment: Pathways to Offender Reintegration 63 (Shadd Maruna & Russ Immarigeon eds. 2004). The successful parolee is the one who manages the psychological challenge of viewing his virtuous identity as the good self that "what was supposed

to be all along." Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 Am. J. of Soc. 420, 421 (1956). "The plan to exit from crime is in large part founded on the self as noncriminal." Tom Meisenhelder, *Becoming Normal: Certification as a Stage in Exiting from Crime*, in Deviant Behaviour: An Interdisciplinary Journal, 137, 140 (1982). The offender must achieve what criminologists call the "agency," a power which is "oriented toward the future . . . projective actions in the transition from adolescence to adulthood advance a new sense of self and a new identity as a desister from crime or, more aptly, as a family man, hard worker, and good provider." John Laub & Robert Sampson, *Shared Beginnings, Divergent Lives* 146 (2003).

These goals are undermined by the power of a police officer, acting solely on the knowledge that the person is a parolee, to treat him as a pre-designated criminal self-suspected of criminal behavior. The continuing expectation of and public humiliation resulting from unregulated police searches destructively reinforce the parolee's "memory traces" of his earlier deviant and incarcerated life, and the self-perceived and publicly attributed stigma deprive him of the social feedback prisoners need to focus on a future, not a past, identity. Stephen C. Richards and Richard S. Jones, *Beating the Perpetual Incarceration Machine: Overcoming Structural Impediments to Re-entry*, in After Crime and Punishment: Pathways to Offender Reintegration 201, 203 (Shadd Maruna & Russ Immarigeon eds. 2004).

If the older criminology simply assumed a moral or cognitive deficiency, the new desistance paradigm calls for activation or reactivation of existing abilities. "Thus, in staking her claim to a conventional identity, the offender commits herself to the ethical code of conduct by which that role is governed and publicly recognized." Judith Rumgay, *Scripts for Safer Survival: Pathways out of Female Crime*, 43 How. J. of Crim. Just. 405, 409 (2004). The offender must entertain an expectation that he or she will be able to

fulfill the expectations of that role, and must be reassured of the "recognition and validation by onlookers of the personal identity expressed by those routines will support its maintenance." *Ibid.* Our activities, responses and displays are moral performances and demonstrations of a social character which profoundly influence our cognitive activities as well." Joseph P. Forgas, *Epilogue, Everyday Understanding and Social Cognition*, in Social Cognition Perspectives on Everyday Understanding 267 (Forgas, ed. 1981).

Moreover, just as exposure of any one member of a household to unregulated police searches stigmatizes all members of that household, so too unregulated police searches in any community with high concentrations of parolees inevitably means that that whole community may feel stigmatized. This deprives individual parolees of the reinforcement of positive civic virtue models they need for desistance. Jeremy Travis, *But They All Come Back: Facing the Challenges of Prisoner Reentry* 293-294 (2000).

II. Denial Of All Fourth Amendment Rights To Parolees Undermines The Trust In The Fairness Of The Criminal Justice System Modern Social Science Has Demonstrated To Be Vital To Inducing A Normative Willingness To Comply With The Law.

The established criminological research on the deterrent power of criminal sanctions proves the incompleteness of the deterrence-based approach. Empirical studies are equivocal as to the success of criminal deterrence, especially because of the so-called threshold effect—*i.e.*, it is the likelihood more than the potential severity of a sanction that most deters potential offenders, and the likelihood factor cannot become psychologically meaningful until it reaches a fairly high threshold that is often infeasible for the police to achieve. But another dramatic paradigm of compliance with law has emerged. The major factor in

causing people to obey the law even when they have no rational fear of sanction is their perception of the procedural fairness of the law. Tom R. Tyler, *Why People Obey the Law* (1990).

Rigorous and extensive experiments in social psychology, reported in the most eminent peer-reviewed journals, establishes that the major determinant of a person's self-initiated willingness to comply with the law is not the fear of sanction or even the likelihood of a self-interested outcome of any legal proceeding, but the person's subjective judgment of the procedural fairness of the legal system. The efficacy of the legal system cannot rest on the frequency and severity of formal sanctions. Rather, it requires cooperation and consent, because only they can facilitate both immediate acceptance and long-term compliance. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 Crime and Justice: A Review of Research 283, 283-285 (M. Tonry ed. 2003). The dominant factor that has been identified as promoting such cooperation and consent is the perception that legal authorities are fair and neutral. This is what social psychology calls "motive-based trust" as opposed to "calculative trust." Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 Boston Univ. L. Rev. 361, 361-366 (2001).

This phenomenon has been confirmed with particular clarity in the area of individual encounters with police. Intensive survey-based empirical research focusing specifically on California showed that the willingness of residents of Oakland and Los Angeles to commit to compliance with the police, even when not facing direct police coercion or sanction, depended on residents' perception that the police had followed routines and processes that were not arbitrary, were unbiased, and that respected their personal dignity, regardless of the actual outcome of any police encounter. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, *supra*, at 330-340.

Respect for the law, especially in former offenders, psychologically requires what has been called "authorization"—the recognition of the legal system as legitimate and the delegation of moral authority to it. Herbert C. Kelman & V. Lee Hamilton, *Crimes of Obedience Toward a Social Psychology of Authority and Responsibility* 16 (1989). In turn, the former offender who acknowledges the legitimacy of the legal system—"authoriz[ing]" it—engages in the feedback mechanism of "self-verification," whereby he commits himself to self-scrutiny of his actions in light of the moral authority he has ascribed to the law. Peter J. Burke & Jan E. Stets, *Trust and Commitment through Self-Verification*, 62 Soc. Psychol. Q. 347 (1999).

It takes little further argument to recognize the implications of this phenomenon for the question of Fourth Amendment rights and parolees. Subjecting the parolee to random, unregulated police searches, without regard to any individual fault or individualized reasonable suspicion of present criminal activity, cannot but undermine the parolee's view of the fairness of the police, as well as the criminal justice system generally. A greater obstacle to the restoration of the parolee's self-motivated normative desire to comply with the law can hardly be imagined.

CONCLUSION

The judgment of the California Court of Appeal should be reversed.

Respectfully submitted.

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